

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

CHRISTOPHER ALAN PERRY,

PETITIONER,

CASE No.: 04-CV-40381  
CRIM. No.: 04-CR-50014

Vs.

HON. PAUL V. GADOLA  
MAG. JUDGE STEVEN D. PEPE

UNITED STATES OF AMERICA,

RESPONDENT.

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**ORDER FOR EVIDENTIARY HEARING**

Petitioner filed a “Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody” on December 30, 2004 (Dkt. #16). He also filed a “Reply in Opposition to Respondent’s Response and Brief Pursuant to 28 USC § 2255,” wherein Petitioner has alleged that he requested that his trial counsel file a notice of appeal following his conviction (Dkt. #19). According to Petitioner after some discussion counsel agreed to file the notice, but failed to follow through with the filing. The law of this circuit indicates that failure to file a notice of appeal, under certain circumstances, can constitute *per se* ineffective assistance of counsel.<sup>1</sup>

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<sup>1</sup>*Ludwig v. United States*, 162 F.3d 456, 459 (6th Cir.1998) (holding that “the failure to perfect a direct appeal, in derogation of defendant’s actual request, is a *per se* violation of the Sixth Amendment”); *Carrion v. United States*, 107 Fed. Appx. 545, 547 (6th Cir. 2004) (in the case of a defendant who waived his right to appeal in a plea agreement, “counsel’s failure to file a notice of appeal as the defendant requested establishes ineffective assistance of counsel *per se*, irrespective of whether the appeal would be successful”). *See also Roe v. Flores-Ortega*, 528

More information than is currently contained in the record is needed in order to make a determination of facts relevant to a resolution of Petitioner's claim. These include, among others, the following:

1. Did Petitioner's counsel consult<sup>2</sup> with Petitioner about filing an appeal?
2. Did Petitioner ask his counsel to file a notice of appeal or instruct his counsel not to file an appeal?

The docket in this case shows that Petitioner's retained counsel was Dale Smith. The docket and current Directory for the State Bar Michigan indicates his contact information as:

Dale M. Smith P38619  
808 E Maple St  
Holly, MI 48442  
Phone: (248) 634-7831  
Fax: (248) 634-0096  
E-mail: catydal@aol.com

Therefore, **IT IS ORDERED** that:

1. An evidentiary hearing will be held before the undersigned at 10:00 a.m. on Tuesday, June 5, 2007, at 600 Church Street, Flint, Michigan 48502, or such time as agreed to by counsel and my deputy courtroom clerk.
2. Pursuant to Rule 8(c) of the Rules Governing Section 2255 Proceedings, on November 6, 2006, counsel was appointed under 18 U.S.C. § 3006A for this

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U.S. 470, 477 (2002) ("we have long held that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable").

<sup>2</sup> In this context, "consult" has a specific meaning: to "advise[e] the defendant about the advantages and disadvantages of taking an appeal, and make[e] a reasonable effort to discover the defendant's wishes." *Roe v. Flores-Ortega*, 528 U.S. at 478. Counsel has a constitutionally imposed duty to "consult" with the defendant when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are non-frivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. *Roe v. Flores-Ortega*, 528 U.S. at 480.

petition and any evidentiary hearing (Dkt. #25).

3. The parties shall appear at the evidentiary hearing and arrangements will be made to provide for Petitioner's presence.
4. All witnesses and material evidence relevant to the above-listed inquiries must be produced at this hearing.
5. The government shall make arrangements to assure the presence of Dale M. Smith whose testimony may be essential to a full development of the record.
6. Questions or concerns regarding these arrangements can be directed to my Deputy Clerk, Pete Peltier at (810) 341-7850, or by mail to him at: Room 112, 600 Church Street, Flint, Michigan 48502.

Dated: April 18, 2007  
Flint, Michigan

s/Steven D. Pepe  
United States Magistrate Judge

#### **CERTIFICATE OF SERVICE**

I hereby certify that on April 18, 2007, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the following: Nancy A. Abraham, David A. Koelzer,

and I hereby certify that I have mailed by United States Postal Service the paper to the following non-ECF participant(s): Dale M. Smith, 808 E. Maple Street, Holly, MI 48442, and Christopher Perry, #32263-039, Federal Medical Center, P.O. Box 14500, Lexington, KY 40512.

s/James P. Peltier  
United States District Court  
Flint, Michigan 48502  
810-341-7850  
E-mail: [pete\\_peltier@mied.uscourts.gov](mailto:pete_peltier@mied.uscourts.gov)